ORIGINAL

Supreme Court, U.S.
FILED
JUL 9 1993
OFFICE OF THE CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

No. 92-9059
October Term, 1992

JONATHAN DALE SIMMONS,

Petitioner,

versus

STATE OF SOUTH CAROLINA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

T. TRAVIS MEDLOCK
Attorney General

* DONALD J. ZELENKA
Chief Deputy Attorney General

Office of the Attorney General
1000 Assembly Street
Post Office Box 11549
Columbia, S. C. 29211
(803) 734-3713

ATTORNEYS FOR RESPONDENT

* Counsel of Record

PETITIONER'S QUESTIONS PRESENTED

I. Does the Eighth Amendment entitle a capital defendant to have the sentencing jury informed, as a reason not to impose the death penalty, that under state law the jury's sentencing alternative of "life imprisonment" means life without the possibility of parole?

II. Did the trial court's refusal to inform the jury that Petitioner could never be paroled if sentenced to life imprisonment violate his due process right to rebut the prosecution's case for death, where the state argued that Petitioner would pose a grave risk of future violence unless he was executed, and where the jury specifically asked about the possibility of parole?

TABLE OF CONTENTS

	Page
Petitioner's Questions Presented	i
Table of Contents	ii
Table of Authorities	iii
Citation to the Opinion Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Respondents' Statement of the Case	2
Why the Writ Should Be Denied	9
Conclusion	18

TABLE OF AUTHORITIES

CASES:	PAGE
Andrate v. McCotter, 805 F.2d 1190 (5th Cir. 1986)	11
Boyde v. California, 110 S.Ct. 1190 (1990)	13
California v. Ramos, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983)	passim
Eaton v. Commonwealth, 240 Va. 236, 397 S.E.2d 385 (1990), cert. denied, 112 S.Ct. 88 (1991)	11
Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965 (1985)	passim
Jenkins v. Virginia, No. 92-7669, ___ U.S. ____, cert. denied (April 19, 1993)	11
Johnson v. Texas, No. 92-5653 ___ U.S. ___ (June 24, 1993)	18
King v. Lynaugh, 850 F.2d 1055 (5th Cir. 1988), cert. denied, 488 U.S. 1019 (1988)	passim
Lockett v. Ohio, 438 U.S. 586 (1978)	17
Maggio v. Williams, 464 U.S. 46 (1983)	11
O'Bryan v. Estelle, 714 F.2d 365 (5th Cir. 1983), cert. denied, 465 U.S. 1013 (1984)	11
O'Dell v. Commonwealth, 234 Va. 672, 364 S.E.2d 491, cert. denied 481 U.S. 871 (1988)	11
People v. Coleman, 544 N.E.2d 330 (Ill. 1989)	15
Peterson v. Murray, 904 F.2d 882 (4th Cir. 1992)	11
Potts v. State, 259 Ga. 96, 376 S.E.2d 851 (1989)	11, 16
Skipper v. South Carolina, 476 U.S. 1 (1986)	passim
State v. William Bell, 406 S.E.2d 165, 171 (S.C. 1991)	17
State v. Coleman, 544 N.E.2d 330 (Ill. 1989)	12
State v. McNeil, 324 N.C. 33, 375 S.E.2d 909 (1989)	11, 16
State v. Middleton, 295 S.C. 318, 368 S.E.2d 457 (1988)	16

	PAGE
State v. Norris, 285 S.C. 86, 328 S.E.2d 339 (1985)	10
State v. Patterson, 299 S.C. 280, 384 S.E.2d 699 (1989)	17
State v. Simmons, 427 S.E.2d 175 (S.C. 1993)	passim
State v. Singleton, 284 S.C. 388, 326 S.E.2d 153 (1985)	16
State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991)	passim
Turner v. Bass, 753 F.2d 342 (4th Cir. 1985)	17
UNITED STATES CONSTITUTION	
Eighth Amendment	1
Fourteenth Amendment	1
UNITED STATES CODE	
28 U.S.C. Section 1257(a)	1
SOUTH CAROLINA CODE	
S.C. CODE Sections 16-3-10, et seq. (1991 Cum. Supp.)	2
S.C. CODE Section 24-21-640 (1991 Cum. Supp.)	2
S.C. CODE Ann. Section 16-1-60 (1991 Cum. Supp.)	2
S.C. CODE ANN. 16-3-26 (1986 Supp.)	3
S.C. CODE ANN. Section 16-1-60 (Cum. Supp. 1991).]	5
S.C. CODE Ann. Section 24-21-640	9
S.C. CODE Section 24-21-950	16

The Respondent, State of South Carolina, hereby makes a Brief in Opposition to the Petition for Writ of Certiorari and requests that certiorari to review the judgment of the Supreme Court of South Carolina in this case be denied.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of South Carolina is reported as State v. Simmons, 427 S.E.2d 175 (S.C. 1993), and is reprinted in the Appendix to the Petition at pages A-1 through A-6. The Order of the South Carolina Supreme Court denying rehearing is unreported, and is reprinted at page A-7 in the Appendix to the Petition.

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on February 1, 1993. A timely Petition for Rehearing was denied on March 10, 1993. This Court's jurisdiction is alleged to be invoked pursuant to 28 U.S.C. Section 1257(a). Respondents will assert that there is no federal question presented and the Court is without jurisdiction to review the claim. U.S.S.Ct.R. 10.1(b).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth Amendment to the United States Constitution, which forbids the infliction of "cruel and unusual punishments."

2. It also allegedly involves the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> [N]or shall any state deprive any person of life ... without due process of law ....

3. It also involves S.C. CODE Sections 16-3-10, et seq. (1991 Cum. Supp.), which code sections are reprinted in the Appendix to the Petition at pages A-8 through A-14.

4. It also involves S.C. CODE Section 24-21-640 (1991 Cum. Supp.), which provides in pertinent part:

> The [South Carolina] Board [of Probation, Parole and Pardon] must not grant parole, nor is parole authorized, to any prisoner serving a sentence for a second or subsequent conviction, following a separate sentencing for a prior conviction, for violent crimes as defined in Section 16-1-60. Provided that where more than one included offense shall be committed within a one-day period or pursuant to one continuous course of conduct, such multiple offenses must be treated for purposes of this section as one offense.

5. It also involves S.C. CODE Ann. Section 16-1-60 (1991 Cum. Supp.), which provides in pertinent part:

> For purposes of definition under South Carolina law a violent crime includes the offenses of murder, criminal sexual conduct in the first and second degree ... [and] burglary in the first degree ....

STATEMENT OF THE CASE

a. Procedural History.

On July 16, 1990, Josie Lamb was murdered after her home in Richland County was the subject of a burglary and larceny. The Petitioner, Jonathan Dale Simmons, was indicted by the Grand Jury of the Court of General Sessions for Richland County for murder, burglary in the first degree, and petit larceny on October 18, 1990. On January 24, 1991, the Solicitor of the Fifth Judicial Circuit, the Honorable Richard A. Harpootlian, served Notice of Intent to Seek the Death

Penalty and Notice of Evidence in Aggravation pursuant to S.C. CODE ANN. 16-3-26 (1986 Supp.).

The Petitioner proceeded to trial on June 24, 1991, before the Honorable Ralph King Anderson, Jr., Presiding Judge, and a jury. He was represented by Thomas J. Quinn, Jennifer Kneece Shealy, and Thomas W. Bunch, II, through court appointment. The State was represented by Solicitor Richard A. Harpootlian, Deputy Solicitor Warren B. "Barney" Giese, and Assistant Solicitor Jonathan S. Gasser. On June 27, 1991, the jury convicted the Petitioner of murder, burglary in the first degree, and petit larceny.

On June 28, 1991, the sentencing hearing began. During the hearing, Mr. Simmons was also represented by current counsel David I. Bruck, Esquire. After the presentation of evidence in aggravation and evidence in mitigation, the jury, on June 30, 1991, returned a unanimous verdict finding the existence of the statutory aggravating circumstance of murder was committed while in the commission of burglary in the first degree and a sentence of death. The trial judge affirmed the jury recommendation of death for murder. Judge Anderson sentenced the Appellant to death for murder, life imprisonment for burglary in the first degree, and thirty (30) days consecutive for petit larceny.

Defense counsel timely served Notice of Appeal on July 1, 1991, and this appeal followed. On March 12, 1991,

the Appellant filed his Initial Brief of Appellant raising three specific issues.

> I. Was Appellant deprived of a fair trial on the charge of burglary in the first degree by the admission of evidence of prior crimes, the prejudicial effect of which substantially outweighed any probative value?
>
> II. Where the state alleges that the defendant will pose an unreasonable risk of future violent acts unless executed, and where state law precludes all possibility of his release on parole if he is sentenced to life imprisonment, is the defendant constitutionally entitled to have the jury apprised of his ineligibility for parole?
>
> III. Did the sentencing instructions fail to protect against consideration of arbitrary factors in the determination of Appellant's sentence, or to assure constitutionally adequate consideration of nonstatutory mitigating factors?

A Final Brief of Appellant was filed August 18, 1992. The Appellant was represented by Mr. Bruck and M. Anne Pearce of the South Carolina Office of Appellate Defense. The Respondent was represented by current counsel, Donald J. Zelenka of the Attorney General's Office. Oral argument was heard on October 13, 1992. On February 1, 1993, the Supreme Court of South Carolina entered its opinion affirming the judgment of conviction and sentence of death. State v. Simmons, 427 S.E.2d 175 (S.C. 1993). A timely Petition for Rehearing was denied on March 10, 1993.

b. Pertinent facts of the case.

1. How the issue of parole ineligibility was presented.

At the outset of the sentencing proceeding, current counsel Bruck and trial counsel Quinn appeared to argue the inapplicability of the prior state court holding in State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), to the present situation and to argue for a sentencing phase instruction specifically on parole ineligibility. (R.A. pp. 1572-1616). In support of parole ineligibility, Indictments 91-GS-32-134 and 135 from Lexington County were presented. Court Exhibits 9, 10. (R.A. pp. 2313-2322). The indictments revealed two separate guilty pleas to criminal sexual conduct in the first degree and sentences imposed on June 19, 1991. [It is without dispute that these are defined violent crimes pursuant to S.C. CODE ANN. Section 16-1-60. (Cum. Supp. 1991).] General Counsel to the South Carolina Department of Corrections, Larry Batson, testified that if the crime of murder were not the same series of events involved in the guilty pleas, Simmons would not be eligible for parole. (R.A. p. 1576). Mr. Batson further acknowledged there were people serving life sentences on work release or who go back into the community. (R.A. pp. 1577-1579). Mr. Batson further acknowledged that there were no statutory prohibitions for an inmate serving life without parole from being either furloughed, put on work release, and that he could not state that he will always remain behind bars. (R.A. pp. 1579-1581). The state agreed to a stipulation that counsel for the current Parole Board would testify that "they will not consider for parole anyone serving

a sentence of life without parole." (R.A. p. 1583). The Petitioner further submitted a survey concerning general public attitudes about the time a convicted murderer serves prior to release. (Court Exhibit 18, R.A. pp. 2323-2331). (R.A. pp. 1583-1584).

After hearing argument, the trial judge entered his Order denying the Appellant's request to charge. (R.A. pp. 1601-1607). Judge Anderson summarized the Torrence decision and concluded:

> I conclude that Torrence should be applied in this case. Therefore, it is ordered that counsel in the matter sub judice shall not engage in any discussion or reference to parole or parole eligibility or parole ineligibility.
>
> Further, this court will not instruct the jury in the initial charge. In the event that the jury inquiries about the matter, the court will use the procedure articulated in State v. John Foster Norris, 328 S.E.2d 3339. The instruction at that time will be as follows: 'You are instructed not to consider parole or parole eligibility. That is not a proper issue for your consideration.
>
> 'The terms "life imprisonment" and "death sentence" are to be understood in their plain and ordinary meaning.'

(R.A. p. 1607, ll. 3-19).

After the Petitioner's initial request had been denied, immediately prior to the jury instructions, the Appellant submitted Defendant's Request to Charge G which stated:

> I charge you that these sentences mean what they say. That is, if you recommend that the defendant Jonathan Simmons be sentenced to

> death, he actually will be sentenced to death and executed. If, on the other hand, you recommend that the defendant be sentenced to life imprisonment, he actually will be sentenced to imprisonment in the state penitentiary for the balance of his natural life.
>
> In your deliberations, you are not to speculate that these sentences mean anything different form what I have just told you, for what I have told you is exactly what will happen to the defendant, depending on what your sentencing decision is.

(R.A. p. 2339). The trial judge denied the charge stating:

> You lawyers are not to discuss parole or the meaning of those words. We just use them in their ordinary sense in your presentation. If there is a jury query in that regard, I'm ready to respond under my prior ruling.

(R.A. p. 2038, ll. 2-8). The jury subsequently began deliberating and sent out the following "billet-doux" from the jury:

> Judge Anderson, June 30, 1991
> Does the imposition of a life sentence carry with it the possibility of parole?
> s/James S. Wright
> Jury Foreperson

Court's Exhibit 19. (R.A. p. 2344). The jury returned to the courtroom where, over Appellant's objection, the trial judge gave this instruction:

> Thank you, Mr. Bailiff. Mr. Foreman, I received the note and I respond as follows: Mr. Foreman and members of the jury, please, please, give me your attention. You are instructed not to consider parole or parole eligibility in reaching your verdict. Do not consider parole or parole eligibility. That is not a proper issue for your consideration. The terms life imprisonment and death sentence are to be understood in their plain and ordinary meaning. The terms life imprisonment and death sentence are to be understood in their plain and ordinary meaning.

(R.A. p. 2106, ll. 1-11). Twenty-five minutes after having its question about parole answered in this fashion, the jury returned to the courtroom with a sentence of death. (R.A. p. 2108, l. 9 - p. 2109, l. 2).

2. How the Supreme Court of South Carolina decided the issue presented to this Court.

In the majority opinion, the Supreme Court of South Carolina concluded that the jury instruction given in this case "satisfies in substance appellant's request for a charge on parole ineligibility." State v. Simmons, 427 S.E.2d at 179. It initially analyzed the prior decision of State v. Torrence, concluding first that (1) parole is not a proper consideration for a sentencing jury since it is not a mitigating circumstance; and (2) practical problems may arise in the application of the parole statutes. Further, Justice Chandler's Torrence analysis relied upon the proposition of this Court in California v. Ramos, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983), that the issue of charging on parole eligibility was solely a matter of state law. Id. at 178.

The State Supreme Court concluded the issue in the following analysis:

> In State v. Davis, ___ S.C. ___, 411 S.E.2d 220 (1991), we clarified that despite our ruling in Torrence, a defendant is still entitled, upon request, to a plain meaning charge under State v. Atkins,,,,, supra. Although the trial judge erroneously declined to give a plain meaning charge upon request in this case, the error was cured when he

properly followed State v. Norris, supra, in answering the jury's question regarding the possibility of parole as follows:

> You are instructed not to consider parole or parole eligibility in reaching your verdict. Do not consider parole or parole eligibility. that is not a proper issue for your consideration. The terms life imprisonment and death sentence are to be understood in their plain and ordinary meaning.

> The test for sufficiency of a jury charge is what a reasonable juror would have understood the charge to mean. State v. Bell, 305 S.C. 11, 406 S.E.2d 165 (1991); State v. Patterson, 299 S.C. 280, 384 S.E.2d 699 (1989). We conclude a reasonable juror would have understood from the charge given that life imprisonment indeed meant life without parole. We therefore find appellant's argument without merit.

State v. Simmons, 427 S.E.2d at 179. Justice Finney dissented. 427 S.E.2d at 180.

WHY THE WRIT SHOULD BE DENIED

1. Petitioner's claim that the jury should have been more fully instructed concerning his ineligibility for parole does not present a federal question.

Simmons asserts that the trial court erred in refusing to instruct in the sentencing phase of his capital trial that he would be ineligible for parole consideration as a "second or subsequent violent offender," pursuant to S.C. CODE Ann. Section 24-21-640. This Court determined in California v. Ramos, 463 U.S. 992, 1001, 1013-1014 (1983), that whether to permit juror consideration of the possibility of commutation and parole is a matter of state law, not

implicating the Federal Constitution. Relying upon a prior decision in State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), the trial judge in this case concluded that a charge on parole eligibility or ineligibility was precluded as a matter of state law. Subsequently, he instructed the "plain meaning" charge required as a matter of state law under State v. Norris, 285 S.C. 86, 328 S.E.2d 339 (1985), that the jury was not to consider "parole or parole eligibility" and the terms "life" and "death" are to be understood in their plain and ordinary meaning. (R.A. p. 1607, ll. 3-19, p. 2106, ll. 1-11). The Supreme Court of South Carolina when presented the issue concluded that the trial judge's "plain meaning" instruction, given in response to the jury's inquiry "satisfies in substance appellant's request for a charge on parole ineligibility." State v. Simmons, 427 S.E.2d at 179. It concluded that, under these facts, "a reasonable juror would have understood from the charge that life imprisonment indeed meant life without parole." Id.

This Court's decision in California v. Ramos, supra, which compels the denial of certiorari, stated:

> Our conclusion is not intended to override the contrary judgment of state legislatures that capital sentencing juries in their states should not be permitted to consider the Governor's power to commute a sentence. It is elementary that states are free to provide greater protections in their criminal justice system than the Federal Constitution requires. We sit as judges, not as legislators, and the wisdom of the decision to permit juror consideration of possible commutation is best left to the states. We hold only that the

Eighth and Fourteenth Amendments do not prohibit such an instruction.

Ramos, 463 U.S. at 1013-1014. Since this issue and the treatment of instructions on parole eligibility [a form of commutation by the executive branch] rests solely with the states under Ramos, we submit that certiorari must be dismissed for lack of a federal question. U.S.Ct.R. 10.1(b).

2. Certiorari is not warranted where similar issues have been denied certiorari by this Court.

This Court has consistently denied petitions for certiorari by Virginia prisoners which presented similar issues on refusal to instruct on parole ineligibility in a capital sentencing proceeding. See, e.g., Jenkins v. Virginia, No. 92-7669, ___ U.S. ____, cert. denied (April 19, 1993); Peterson v. Murray, 904 F.2d 882 (4th Cir. 1992); Eaton v. Commonwealth, 240 Va. 236, 397 S.E.2d 385 (1990), cert. denied, 112 S.Ct. 88 (1991); O'Dell v. Commonwealth, 234 Va. 672, 364 S.E.2d 491, cert. denied 481 U.S. 871 (1988). This Court's prior denials of certiorari "are ample evidence" that the matter is not an issue worthy of certiorari. See Maggio v. Williams, 464 U.S. 46, 51-52 (1983). See also O'Bryan v. Estelle, 714 F.2d 365, 388-89 (5th Cir. 1983), cert. denied, 465 U.S. 1013 (1984); Andrate v. McCotter, 805 F.2d 1190, 1192-93 (5th Cir. 1986); King v. Lynaugh, 850 F.2d 1055 (5th Cir. 1988), cert. denied, 488 U.S. 1019 (1988); State v. McNeil, 324 N.C. 33, 375 S.E.2d 909, 915-916 (1989); Potts v.

State, 259 Ga. 96, 376 S.E.2d 851, 856-57 (1989); State v. Coleman, 544 N.E.2d 330, 342-43 (Ill. 1989).

3. The state court conclusion that the "plain meaning" instruction satisfied the request was an appropriate determination.

Respondent asserts that the issue of whether the jury need be advised of parole ineligibility is not properly before this Court because the state court properly concluded that the "plain meaning" instruction under a "reasonable juror" determination "satisfies in substance appellant's request for a charge on parole ineligibility." Simmons, 427 S.E.2d at 179. As stated previously, we assert that the issue of whether or not a parole ineligibility charge should be given in a capital case is solely a matter of state law and does not present a federal question under Ramos, supra. The state court, without addressing the issue presented to this Court concluded "a reasonable juror would have understood from the charge given that life imprisonment indeed meant life without parole." Id.

Certiorari is not warranted because the State Supreme Court did not conclude whether or not a parole ineligibility charge should be given in a capital case. The state court, in fact, concluded that a parole ineligibility charge was in fact given. Second, it concluded that the state law requirement for a "plain meaning" instruction had been complied with in response to the jurors questions. Id.

Here, the jury was given in the "plain meaning" instructions accurate and correct information as a matter of state law. First, they were told not to consider parole or parole eligibility in making their decision. It is reasonably likely that a juror would have understood the instruction to mean what it said and followed that instruction. Boyde v. California, 110 S.Ct. 1190 (1990). Cf. Francis v. Franklin, 471 U.S. 307, 324 n. 9, 105 S.Ct. 1965, 1996 n. 9 (1985). ("The Court presumes that jurors, conscious of the gravity of their tasks, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them.") Further, it is reasonably likely that the jurors, after being told not to consider parole or parole eligibility to have concluded that the terms "life imprisonment and death sentence are to be understood in their ordinary and plain meaning" would have meant for "life" to be the duration of his life, not as the Petitioner now would suggest.

In King v. Lynaugh, 850 F.2d 1055 (5th Cir. 1988) (en banc), the Fifth Circuit considered related issues presented concerning alleged juror misperceptions about parole law in a capital case. The potential influence of a juror's misperceptions about parole eligibility may be mitigated by other facets of the trial process, such as the breath of voir dire and the jury charge. Here, parole eligibility was not injected into the voir dire process. Repeatedly, the court

and defense counsel here offered only two sentencing options: life imprisonment or death. Here, as in King, if the jurors paid attention during voir dire and followed the trial court's charge and supplemental charge, as this Court must presume they did, any pre-existing misconceptions about parole law would have been ignored. Accord King, supra, at 1060.

In his argument, he relies upon a public opinion survey which he contends would show citizen misconceptions about parole. This survey has little weight because the Court must presume the juror listened to and followed the law as given, Francis v. Franklin, supra, and not have jury instructions determined on the basis of such surveys. Furthermore, the problem with his claim that "all possibility of his eventual release on parole is foreclosed by law" does not accurately take into account (1) other forms of "release" that the survey did not account for and (2) different legal interpretations or statutory amendments which may occur in the future. See California v. Ramos, 463 U.S. 992 (1983). If the Petitioner wants "accurate" information about whether the Petitioner could ever be released form close confinement -- then shouldn't the jury also be advised that he may be placed on work release, trustyship, or furlough at some time in the future and further, that he could be pardoned at any time under extraordinary circumstances. [Testimony of Batson, R.A. pp. 1576-1581]. In Ramos, the Supreme Court recognized that such instructions, including the parole instruction, are not

constitutionally required, and left those decisions to the state legislatures and courts on whether such instructions would occur. In Torrence the state court reasonably decided that it would not inject such information into jury deliberations. This case does not provide a need to do so now and reopen what has been a state law matter since Ramos.

In his argument, Simmons devotes a great deal to his analysis of what twenty-two states with life without parole have done with respect to jury instructions. While not disagreeing with his analysis of the other state laws which have life without parole, we do disagree with his groups. First, the jury in four states, Maryland, Nevada, Oklahoma, and Oregon, have a choice between life without parole (LWOP) and life with parole. Those states are clearly not similar to the South Carolina situation. It would appear then that only three (3) states, Colorado, Illinois, and Mississippi, require that the jury be informed of the "no parole" status. Importantly, Illinois in People v. Coleman, 544 N.E.2d 330 (Ill. 1989), recognized that the issue was purely a state law matter and concluded there was no constitutional violation in the failure to give such an instruction. In the nine (9) states the Petitioner cites in note 21, it would appear that the terms of verdict explain the sentence as being without parole. Nevertheless, Respondent submits that this is far from overwhelming as two states, Virginia and Pennsylvania, specifically do not allow such instructions and four others

have not yet addressed the issue. Further, instructions concerning eligibility for parole have been rejected in Georgia, Potts v. State, 376 S.E.2d 851, 856-57 (Ga. 1989), and North Carolina, State v. McNeil, supra. Under California v. Ramos, the court left it to the state legislatures to determine when the instructions about release programs be given, but does not create a federal constitutional violation.

Further, Simmons now contends that his history of brutal attacks upon elderly women created an enhanced need for the no-parole instruction because of his alleged showing that he only posed a danger to elderly women who he would not have contact with if he remained in the prison setting. The Appellant recognizes, however, that there was no mention from any witness presented to the jury, argument by either counsel, or the instructions of the possibility of parole. The problem with his speculation in the area is that it ignores the testimony of Mr. Batson and the current status of correctional law that he could be eligible by statute for furloughs, work release trusty, or pardon pursuant to Section 24-21-950, and that, in fact, inmates do infrequently escape from confinement into the general public and may commit brutal crimes. See State v. Singleton, 284 S.C. 388, 326 S.E.2d 153 (1985); State v. Middleton, 295 S.C. 318, 368 S.E.2d 457 (1988) (escapee from Corrections work crew); Kornahrens v. Aiken, 87-CP-10-3010, Charleston County certiorari appeal (death row inmate escapes during PCR hearing). The Petitioner's problem,

therefore, is that the trial judge's instruction of "plain meaning" was actually more factually accurate than the Petitioner's requested instruction which would have suggested that he would always remain inside a prison. (Petition, p. 10).

Respondent would further assert that parole ineligibility is not a mitigating factor under Skipper v. South Carolina, 476 U.S. 1 (1986). The state court rejected similar arguments in State v. Patterson, 299 S.C. 280, 384 S.E.2d 699 (1989); and State v. William Bell, 406 S.E.2d 165, 171 (S.C. 1991). While we may agree that an individual's future adaptability to prison may be more speculative than parole ineligibility, it does not create a relevant mitigating circumstance under Skipper, supra.

In Peterson v. Murray, 904 F.2d 882 (4th Cir. 1990), the court concluded that an instruction that did not tell a jury of a defendant's ineligibility for parole (for twenty years) did not prevent the jury from considering relevant mitigating evidence under Lockett v. Ohio, 438 U.S. 586, 604-605 (1978). Accord Turner v. Bass, 753 F.2d 342, 354 (4th Cir. 1985). Respondents submit that the fact of a prior history of violent crime placing a defendant in a status of not being able to be considered for parole as opposed to being parole eligible is not a "mitigating" fact and does not violate the mandates of Skipper v. South Carolina, 476 U.S. 1 (1986). Lockett stands for the proposition that "the Eighth

and Fourteenth Amendments require that the sentencer ... not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Accord Johnson v. Texas, No. 92-5653 ___ U.S. ___ (June 24, 1993). Here, the Petitioner seeks to use the sentence itself as "mitigating evidence" under Lockett. Parole eligibility or ineligibility is not "relevant mitigating evidence." His assertion to the contrary must be denied as a reason for certiorari.

CONCLUSION

For all the foregoing reasons, certiorari must be denied.

Respectfully submitted,

T. TRAVIS MEDLOCK
Attorney General

DONALD J. ZELENKA
Chief Deputy Attorney General

ATTORNEYS FOR RESPONDENT

By:

July 9, 1993

Columbia, South Carolina